

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAX MICHAEL HAWKINS,

Defendant-Appellant.

UNPUBLISHED

October 19, 2006

No. 262677

Wayne Circuit Court

LC No. 04-008265-01

Before: Murray, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b. The trial court sentenced defendant to life in prison for the murder conviction, 50 to 100 years in prison for the assault with intent to commit murder conviction, 5 to 10 years for the felon-in-possession conviction, and 2 years in prison for the felony-firearm conviction. We affirm. This case arises from a shooting which left one victim, Earl Riley, dead and another victim, Jason Taylor, seriously wounded.

Defendant argues that the trial court violated his due process rights¹ in admitting photographs of Jason Taylor in the hospital. We disagree. We review a trial court’s decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Photographs are admissible if they are relevant under MRE 401 and their probative value is not substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Mills*, 450 Mich 61, 66, 75; 537 NW2d 909, mod 450 Mich 1212 (1995). Defendant was charged with assault with intent to murder Taylor, so his intent to kill was directly at issue in the case. Evidence of the type, placement, and number of injuries bears on a defendant’s intent to kill. See *id.* at 71-72. However, MRE 403 provides that relevant evidence may be excluded if its

¹ Defendant frames several of his issues as constitutional in nature, even though they boil down to general claims of error. See *WA Foote Mem Hosp v Dep’t of Pub Health*, 210 Mich App 516, 524; 534 NW2d 206 (1995). Because defendant fails to demonstrate any error on these issues, we do not address the constitutional implications of the alleged errors.

probative value is substantially outweighed by the danger of unfair prejudice. Under the circumstances, defendant fails to demonstrate that the danger of unfair prejudice substantially outweighed the probative value of the photographs. The photographs are not particularly grisly or provocative, and like the photographs in *Mills*, they accurately represented Taylor's injuries. *Mills*, *supra* at 77. Therefore, the trial court did not abuse its discretion in admitting the photographs of Taylor at the hospital.

Defendant contends that the trial court violated his due process rights in admitting evidence that he purchased marijuana from Taylor. We disagree. Defendant failed to preserve this issue, so we review it for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A prosecutor may not introduce evidence of other crimes, wrongs, or acts in order to prove a defendant's character or propensity for criminal behavior. MRE 404(b)(1). However, evidence of other acts may be admissible to prove motive, opportunity, intent, preparation, scheme, or plan. *Id.* Here, the evidence of prior marijuana sales between defendant and Taylor was relevant to prove defendant's motive for killing Riley and assaulting Taylor. "Without such evidence, the factfinder would be left with a chronological and conceptual void regarding the events" leading to the assault. *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). No request was made for a limiting instruction and none was given. Under the circumstances, the probative value—providing a motive or intent—was not substantially outweighed by any prejudicial effect the evidence may have created. Accordingly, defendant has failed to demonstrate plain error on this issue.

Defendant next argues that the trial court violated his due process rights in denying his motion for mistrial on the basis of Michigan State Trooper Steven Kramer's testimony, which implied that defendant fled the jurisdiction. We disagree. Appellate courts review for abuse of discretion a trial court's denial of a motion for mistrial. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Although Kramer testified that he was in the process of filing a federal flight warrant for defendant, he explained that it was not necessary because defendant had been detained. Therefore, any prejudice from the testimony was necessarily minor, and the trial court was in the best position to determine the effect on the jury. *People v Grove*, 455 Mich 439, 476; 566 NW2d 547 (1997). We also note that the trial court denied the prosecutor's request for a jury instruction on flight. We defer to the trial court's determination that the evidence did not warrant a new trial. *Id.*

Defendant argues that the prosecutor committed misconduct during her closing argument by explaining, incidentally, that Michigan does not permit the death penalty. We disagree. "Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial" *Id.* Generally, jurors may not consider the sentencing ramifications of their verdict. *People v Goad*, 421 Mich 20, 27, 36; 364 NW2d 584 (1984). Therefore, a prosecutor's intentional reference to the death penalty's applicability is an improper statement that amounts to misconduct.

However, defendant fails to demonstrate that the prosecutor intended to inject the issue of defendant's penalty into the trial. Taken in context, the prosecutor directed the improper reference to Riley's "execution," and presented the rhetorical question of what misdeed Riley could have committed to warrant defendant's infliction of such a severe penalty. The argument accurately stated the law, and the prosecutor limited the argument somewhat to the victim's

possession of marijuana. Because the prosecutor did not directly link the lack of death penalty to defendant's murder charges, the effect of the prosecutor's improper reference is questionable. Moreover, although the trial court overruled defendant's objection, it immediately responded that the prosecutor was not discussing defendant's potential penalty, but arguing his guilt. The trial court explained that the prosecutor's comments were pure argument and offered that "I don't think that has anything to do with this case." The prosecutor immediately redirected the jury to the case's facts and away from the penalty issue. The trial court later instructed the jury not to consider the potential sentence or penalty. Under the circumstances, the trial court ameliorated much of the prejudice caused by the prosecutor's argument, and, assuming *arguendo* that the error rose to a constitutional level, it was not structural and was harmless beyond a reasonable doubt. *People v Bauder*, 269 Mich App 174, 179-180; 712 NW2d 506 (2005).

Defendant next claims that he was deprived of effective assistance of counsel by a conflict of interest created when trial counsel employed a strategy that involved placing defendant at the scene of the shooting. We disagree. Because a *Ginther*² hearing was never conducted, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). When claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556-557; 581 NW2d 654 (1998). Although defendant asserts that there was a conflict between his counsel's strategy and his own version of events, there is no evidence in the lower court record to support this assertion. Therefore, defendant has failed to show that trial counsel was ineffective because of an actual conflict of interest.

Similarly, defendant contends that trial counsel was ineffective in failing to pursue an alibi defense or call an endorsed witness, a Nextel representative, to testify. Defense counsel stated that he had investigated the alibi witnesses and found that none of them were cooperative. Counsel confirmed that defendant agreed with the decision not to call alibi witnesses Nikia Brockington, Adan Knowles, Eric Gibson, and Nyree Phillips, to testify at trial. Defendant stated his assent on the record, thereby waiving any error. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Likewise, defendant fails to demonstrate any prejudice from his trial counsel's strategic decision to waive presentation of the Nextel representative. Where counsel's conduct involves a choice of strategies, it is not deficient. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The fact that a particular strategy is not successful does not demonstrate that counsel was ineffective. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

Defendant also contends that his alibi could have been supported by Charmain Wright, a woman named Maria, the proprietor of a nightclub, and the surveillance camera from a nightclub that defendant claims to have visited at the time of the shootings. However, these witnesses were never provided on a notice of alibi or discussed on the record, and there is no mention of the surveillance camera on the record. Our review is limited to mistakes apparent on the record,

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

which provides no support for defendant's assertions. See *Riley*, *supra* at 139. Therefore, defendant's claim of ineffective assistance of counsel fails.

Defendant also claims that counsel deprived him of his right to testify. However, defendant fails to present any evidence that his trial counsel coerced his decision not to testify, and the right is waived, "if defendant, as in this case, decides not to testify or acquiesces in his attorney's decision that he not testify" *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985).

Defendant next contends that the trial court's reasonable doubt instructions were defective. We disagree. Defendant challenges the trial court's failure to instruct the jury that reasonable doubt may arise from the lack of evidence, asserting that this omission suggested a lesser standard of proof. Defendant also challenges the trial court's use of the phrase "moral certainty," and suggests that the instructions shifted the burden of proof. Defendant's failure to either request the jury instruction or object to the trial court's failure to give the instruction *sua sponte* precludes defendant from seeking plenary review. *People v Gonzalez*, 468 Mich 636, 642; 664 NW2d 159 (2003). We will only review the issue for plain error affecting his substantial rights. *Id.* at 643. As long as the trial court instructs the jury that the prosecution must prove defendant's guilt beyond a reasonable doubt, no particular form of words is required. *Victor v Nebraska*, 511 US 1, 5; 114 S Ct 1239; 127 L Ed 2d 583 (1994).

A reviewing court's inquiry is whether there is a reasonable likelihood that the jury misunderstood the instructions to mean that the prosecution was not required to prove every element of the charged offenses beyond a reasonable doubt. *Id.* at 6. The trial court in the instant case stated three times that reasonable doubt was a doubt that you should have a reason for having, and stated twice that reasonable doubt was an honest and reasonable doubt. The trial court also instructed the jurors that they should use reason and common sense. The trial court made at least four references to the prosecutor having the burden of proof. Therefore, the trial court's omission of an instruction on the lack of evidence did not render the reasonable doubt instructions defective. *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 493 (1996). The court's explanation that "reasonable doubt" was not a "hunch" and should be a doubt that you should have a reason for having did not shift the burden of proof, *id.* at 488, and the instructions regarding "moral certainty" did not taint the court's instructions. *Victor*, *supra* at 14-15. Finally, because the trial court's reasonable doubt instruction was not defective, defense counsel was not required to make a futile objection opposing it. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002).

Defendant argues that the prosecutor knew or should have known that Taylor committed perjury when he testified that he was shot in the hip and that he communicated with defendant on the day of the murder. We disagree. Defendant again failed to preserve this issue in the trial court, so we will not reverse his conviction on this basis unless we find plain error that affected his substantial rights. *Carines*, *supra*. Although "the prosecutor may not knowingly use false testimony to obtain a conviction," *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998), defendant fails to substantiate his claim that the prosecutor should have known that the testimony was false, and ultimately fails to demonstrate any prejudice from the testimony. Photographs were available to demonstrate that Taylor was indeed shot, and defendant had every opportunity to challenge Taylor's credibility on the specifics of the matter. Similarly, there is no indication that Taylor's testimony regarding the telephone communication was false, or that the

prosecutor had any reason to know of its alleged falsity. See *id.* Therefore, defendant does not demonstrate any plain error affecting his substantial rights in the admission of Taylor's testimony regarding the telephone calls or the specific injuries Taylor received.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood